

LESLIE E. DEVANEY
ANITA M. NOONE
LESLIE J. GIRARD
SUSAN M. HEATH
GAEL B. STRACK
ASSISTANT CITY ATTORNEYS

CRISTIE C. McGUIRE
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Casey Gwinn
CITY ATTORNEY

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4199
TELEPHONE (619) 236-6220
FAX (619) 236-7215

MEMORANDUM OF LAW

DATE: January 30, 1998

TO: Committee on Rules, Finance and Intergovernmental Relations

FROM: City Attorney

SUBJECT: Requirement for a Statement of Reasons Against a Referendum Petition, or an Impartial Analysis of the Legislative Act, to be Included with a Referendum Petition

At its November 24, 1997, meeting, the City Council asked the City Attorney to report to the Committee on Rules, Finance and Intergovernmental Relations on two questions pertaining to the referendum process. This memorandum of law is in response to that request.

QUESTIONS PRESENTED

1. May the City require referendum proponents to include in their petition a statement of reasons *against* the referendum?
2. May the City require the City Attorney to prepare an impartial analysis of a legislative act sought to be referred to the voters, which analysis would be circulated as part of the referendum petition?

SHORT ANSWERS

1. Yes, but if the City Council were to add such a requirement to the City's Municipal Code, the City would have the difficult burden of showing (1) the requirement advances a compelling governmental interest, and (2) the requirement law is narrowly drawn to serve that interest.

2. Yes, the City could require referendum proponents to include an impartial analysis of the legislative act prepared by the City Attorney in their petition. However, the City must ensure that the analysis is impartial, and not an argument against the referendum.

BACKGROUND

San Diego Municipal Code [SDMC] sections 27.2601-2624, as amended on November 24, 1997, set forth the City's referendum procedures. The Municipal Code requires a statement of reasons *for* a referendum to be included with the referendum petition. SDMC § 27.2604. The Municipal Code does not require an impartial analysis prepared by the City Attorney to be included in a referendum petition. The City Council wants the City Attorney to research the validity of requiring referendum petition proponents to include either a statement of reasons against the petition or an impartial analysis prepared by the City Attorney, or both, in the referendum petition.

ANALYSIS

I. Referendum is a Power Reserved to the People by the State Constitution and the City Charter

Referendum is a power reserved to the people, not granted to them. Cal. Const. art. IV, § 1. See also Martin v. Smith, 176 Cal. App. 2d 115, 117 (1959). A city's voters exercise their referendum powers under procedures the state legislature adopts, unless that city operates under a charter that provides for referendum. Cal. Const. art. II, § 11. The state constitution allows a charter city to make and enforce ordinances "in respect to municipal affairs," including elections. Cal. Const. art. XI, § 5(b)(3).

San Diego's Charter reserves the referendum power to the people of this City. San Diego Charter § 23. The Charter requires the City Council to adopt an election code ordinance, which is to include "an expeditious and complete procedure for the exercise by the people of the initiative, referendum and recall, including forms of petitions" Id. The Charter states that five percent of the City's registered voters at the last general election are sufficient to force a vote on a referendum. Id.

II. Municipal Code Provisions Implementing the Referendum Power

The City Council has duly adopted an elections code, which is located in article 2, chapter II of the Municipal Code. When the Municipal Code is silent, state law governs. SDMC § 27.2004(b). Referendum procedures are located in sections 27.2601-27.2624 of that article.

With few exceptions any legislative act is subject to referendum. SDMC § 27.2601. The major steps in a referendum process are as follows: (1) City Council adopts a legislative act (usually an ordinance); (2) within thirty days after the act's adoption, opponents of the legislative act may circulate a referendum petition asking voters to place the matter on an election ballot and may submit the petition to the City Clerk for verification of signatures; (3) on behalf of the City Clerk, the County's Registrar of Voters verifies the signatures; (4) if the referendum petition is certified to have received the requisite number of valid signatures, the City Clerk presents the petition to the City Council; and, (5) the City Council directs the City Attorney to prepare an ordinance rescinding the original legislative act or calling an election on the referendum.

If the opponents submit a referendum petition with the requisite number of prima facie valid signatures the legislative act is suspended until the City Clerk either certifies the petition as valid or does not certify it. Charter § 23; SDMC §27.2618(a). If the Clerk certifies the petition, and City Council does not rescind the legislative act but places it on a ballot, the act remains suspended until the election. SDMC § 27.2618(a).

III. Constitutional Issues Raised by Adding Burdens to Referendum Process

To impose a new requirement on the referendum process, the question becomes whether the "requirement impermissibly or unacceptably burden[s] [the proponent's] right of political expression." Browne v. Russell, 27 Cal. App. 4th 1116, 1122 (1994) citing Buckley v. Valeo, 424 U.S. 1, 44-45 (1976) (holding an ordinance requiring circulators of referendary petitions to be residents and registered voters of a charter city does not violate free speech or the right to challenge local government through referendum). If a law severely restricts a referendum petitioner's rights, "it can survive constitutional scrutiny only if the government shows that it advances a compelling state interest and is narrowly construed to serve that interest." Id.

IV. Validity of Requiring Statement of Reasons Against A Referendum to be Included in the Referendum Petition

SDMC section 27.2604 requires a referendary petition's proponents to include, among other things, a statement of reasons *for* the petition in the petition itself. Section 27.2606 limits the statement of reasons to 300 words. The Council wants the opportunity to present reasons against the petition in the petition itself. This opportunity already exists in the City's laws.

Although not labeled "statement of reasons *against* the referendum petition," a legislative act's recitals, if any, constitute such a statement. A legislative act's recitals provide historical background for the act and state the reasons why the Council believes the act should be adopted. Many legislative acts, especially those that are controversial and likely to be made the subject of a referendum petition, bear recitals. In contrast with the 300 word limit on the statement of reasons for the referendum, there is no word limit on recitals.

A legislative act's recitals are part of the act itself and therefore must be part of, and circulated with, the petition. SDMC § 27.2604. Requiring the full text of a legislative act to be included in a referendum petition has been specifically upheld by the courts. Nelson v. Carlson, 17 Cal. App. 4th 732, 738 (1993).

If the Council wants to require petition proponents to include as part of their petition another statement of reasons against the petition in addition to the recitals already contained in the legislative act, the requirement may unconstitutionally burden the referendum process. The City would have to show (1) a compelling governmental interest is served by that added requirement on the petitioner, and (2) the requirement is narrowly drawn to serve that interest. Browne v. Russell, 27 Cal. App. 4th at 1122. Both may be difficult to establish in light of the fact that the Municipal Code already requires the entire legislative act, including any recitals justifying the act's passage, to be included as part of the petition that referendum proponents circulate. SDMC § 27.2604.

Instead of requiring referendum proponents to include yet another statement of reasons against the referendum in their petition, the Council could simply eliminate the requirement in its current laws that referendum proponents include a statement of reasons for the petition in the referendum petition. In contrast with the City's laws, state law does not require or allow a referendum proponent in a general law city to include a statement of reasons for the petition in the petition itself. Cal. Elec. Code § 9238.

A. Validity of Requiring an Impartial Analysis Prepared by City Attorney to be Included with Referendum Petition

The City Council wants the ability to require the City Attorney to prepare an impartial analysis of a legislative act sought to be referred, which analysis would be circulated as part of the referendum petition. Nothing in the current Municipal Code or state law requires or allows an impartial analysis of a referendum petition to be included in the petition. However, current law provides for preparation of an impartial analysis at a later stage in the referendum process. Under current law, the City Council may direct the City Attorney to prepare an impartial analysis of a referendum for placement in the sample ballot that is mailed to all voters. SDMC § 27.2004(a); Cal. Elec. Code § 9280.

If the City were to require an impartial analysis prepared by the City Attorney to be included as part of the referendum proponent's petition, the City should be prepared to show that the requirement serves a compelling governmental interest and that the requirement is narrowly drawn to meet that interest. In addition, the City would have to ensure that the analysis was truly impartial and not merely another opportunity for argument, as the following case law demonstrates.

In California, the duty to prepare titles, summaries and analyses of initiatives and referenda falls to governmental entities, not the proponents of the initiative or referendum. See, e.g., Cal. Elec. Code § 9203(a) (requiring city attorney in general law cities to provide a ballot title and summary of a proposed initiative); Cal. Elec. Code § 9280 (requiring city attorney to prepare impartial analysis of referendum to be published in sample ballot upon request of legislative body). Even where the statute does not specify that a government's title, summary or analysis of an initiative or referendum must be impartial, case law makes that point clear.

Many California cases discussing a government's duty of impartiality arise in the initiative arena, as well as the closely related referendum arena. See, e.g., Clark v. Jordan, 7 Cal. 2d 248 (1936) (holding that a misleading initiative title prepared by the Secretary of State violated the then Political Code). The legal principles enunciated in the initiative cases apply to referendum, and vice-versa. Therefore, the cases we cite below pertain both to referenda and initiatives.

The purpose behind laws requiring titles, summaries, or analyses of initiatives or referenda to be submitted to the voters is to give the elector additional information about the nature of the petition he or she is asked to sign. Id. at 249-50. "No elector can intelligently exercise his rights under the initiative law without a knowledge of the petition which he is asked to sign, and any legislation which will increase the facilities of the elector to acquire such information is well within the terms of the Constitution permitting the enactment of legislation to facilitate the operation of

this provision of the Constitution.” Id. at 250. “[B]ecause a referendum petition asks electors to make a decision about their acceptance or nonacceptance of a proposed ordinance, it requires that voters be fully informed of the substance of the challenged measure so that the petition reflects the actual informed will of the people.” Billig v. Voges, 223 Cal. App.3d 962, 967 (1990).

In construing former Elections Code section 5011 (now Elections Code section 9280), requiring a city attorney to prepare an impartial analysis of a ballot measure, the court stated “the purpose of statutes like section 5011 is to foster a more informed electorate by supplying correct information about the measures appearing on any given ballot.” Horwath v. City of East Palo Alto, 212 Cal. App. 3d 766, 777 (1989).

As a general rule, laws that are “designed to give the voter the information necessary to intelligently exercise elector rights are constitutional and enforceable.” Billig v. Voges, 223 Cal. App. at 967, n.2. Laws “designed to protect the elector from confusing or misleading information should be enforced so as to guarantee the integrity of the process.” Chase v. Brooks, 187 Cal. App. 3d 657, 663 (1986).

In sum, a court would probably find that requiring referendum proponents to include an impartial analysis of the referendum in their petition meets the compelling governmental purpose of more fully informing the voter about the referendum. Since the City Council already has the option of requiring an impartial analysis to be prepared by the City Attorney for placement in the sample voters’ pamphlet, it is not possible to predict whether a court would find this additional requirement too broadly drawn to serve the governmental interest. Any summary or analysis of a referendum must be fair and impartial. The purpose of summaries or analyses is to inform the voters, not to mislead them or to argue for or against the referendum.

B. Shortening Time to Circulate Petition for Purpose of Adding Impartial Analysis as Impermissible Burden

If the City were to require that an impartial analysis be prepared by the City Attorney and be included in the proponent’s referendum petition, the City Attorney would have to be allowed some time — for example, ten days — to prepare the analysis. The time necessary to prepare the analysis would have to be added to or subtracted from the time allowed to circulate the referendum petitions. If it were subtracted, it will probably impermissibly burden petitioners’ right to exercise their rights of referendum. As between the provisions of the Constitution and local law, “those which reserve the greater or more extensive referendum power in the people will govern.” Hunt v. Mayor & Council of City of Riverside, 31 Cal. 2d 619, 623 (1948). Therefore, if the signature-gathering period is extended, the thirty-day period between the passage of the legislative act and the date it goes into effect must also be extended. To avoid impermissibly

burdening the right of referendum, the time in which a legislative act will be suspended should be extended.

CONCLUSION

The City Council asked the City Attorney to explore requiring referendum proponents to include a statement of reasons *against* the referendum in their petition. A similar requirement already exists in the Municipal Code. SDMC section 27.2604 requires the full text of the legislative act — including recitals giving reasons for adoption of the act — that is the target of the referendum to be included in the petition. Requiring a legislative act's full text to be included in the referendum petition has been specifically upheld by the courts. Nelson v. Carlson, 17 Cal. App. 4th 732 (1993). If the City Council were to add this requirement to the City's Municipal Code, the City have to show (1) the requirement serves a compelling governmental interest, and (2) the requirement will narrowly meet that interest.

The City Council also asked the City Attorney to explore whether the City can require referendum proponents to include an impartial analysis of the referendum prepared by the City Attorney in their petition. To survive a constitutional challenge, such a requirement would have to (1) serve a compelling state interest, and (2) narrowly meet that interest. Additionally, the City would have to ensure that the analysis is impartial, and not an argument against the referendum effort. Finally, the time that the targeted legislative act is suspended before it could become effective would have to be extended to allow the City Attorney a reasonable time to prepare the analysis. Reducing the time currently allowed to circulate referendum petitions to accommodate that need would impermissibly burden the proponents' rights to exercise their referendum powers.

CASEY GWINN, City Attorney

By

Cristie C. McGuire
Deputy City Attorney

CCM:jrl(043.1)
ML-98-6